

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 06-0232
Quality Assessment Fee for 2003 - 2005**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Health Facility Quality Assessment Fee – Constitutionality

Authority: IC § 6-8.1-5-1(b); PL 224-2003 § 70; PL 78-2004 § 27; PL 186-2005; PL 18-2006; U.S. Const. amend V; Ind. Const. art. I, § 21; Ind. Const. art. I, § 23; Ind. Const. art. I, § 24; Ind. Const. art. I, § 25; Ind. Const. art. IV, § 1; Ind. Const. art. IV, § 22; Ind. Const. art. IV, § 23.

Taxpayer protests the imposition, assessment, and collection of the Health Facility Quality Assessment Fee (HFQA), imposed by PL 186-2005, as a violation of the Indiana Constitution and the United States Constitution.

II. Health Facility Quality Assessment Fee—Inapplicability to Taxpayer

Authority: PL 186-2005(f)(3)(a); IC 23-2-4-1; IC 23-2-4-3; CPA Standard SOP 90-8, *CPA Journal*, May 1991.

Taxpayer protests the collection of the Health Facility Quality Assessment Fee because Taxpayer asserts it is exempt from collection under PL 186-2005 as a "continuing care retirement community."

STATEMENT OF FACTS

Taxpayer is an Indiana corporation that operates a retirement community. The community includes apartments, and Taxpayer provides comprehensive health care in a health pavilion consisting of various facilities for assisted living and 66 nursing beds. Taxpayer cares for residents and persons on Medicare, but does not and has never accepted Medicaid.

Senate Bill 169 was signed by the Governor on March 13, 2006 and was enrolled as PL 18-2006, effective July 1, 2006. PL 18-2006 is an extension of the Health Facility Quality Assessment Fee (HFQA), enacted in PL 186-2005. PL 18-2006 amended PL 186-2005, which was set to expire August 1, 2006. PL 18-2006 expires August 1, 2007. The history of the HFQA is as follows:

Enacted in to law: PL 224-2003 § 70
Amended by: PL 78-2004
Amended by: PL 186-2005

Amended by: PL 18-2006.

The substance of Taxpayer's protest is founded upon PL 186-2005. PL 186-2005 was enacted retroactively effective to July 1, 2003. The law creates a retroactive tax, called a "quality assessment" on certain "nursing facilities" and "health facilities." The responsibility for collection and enforcement of the tax is shared by the Department, which collects the tax from "health facilities," and the Office of Medicaid Planning and Policy, which collects the tax from "nursing facilities."

In October 2005, Taxpayer received a Notice of Quality Assessment from the Indiana Family & Social Services Administration (FSSA). FSSA calculated that Taxpayer had 18,360 non-Medicare resident days in 2002 and 17,876 in 2003. FSSA used the 2002 figure to calculate the tax owed for the period July 1, 2003 to March 31, 2004. FSSA used the 2003 figure to calculate the tax owed for the period April 1, 2004 to March 31, 2005. Taxpayer asserts that because FSSA set the rate at \$10 per resident day, the total calculated amount due for July 1, 2003 to March 31, 2005 is \$316,460, all of which is retroactive and unrecoverable.

A hearing was scheduled and held. This letter of findings results.

I. Health Facility Quality Assessment Fee – Constitutionality

DISCUSSION

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC § 6-8.1-5-1(b).

Much of the discussion is a compilation of information provided by Taxpayer and research conducted by the Department. The extended background provided in this letter of finding is included in order to illuminate the issues protested by Taxpayer. The information below outlines and summarizes the development of the Healthcare Quality Assessment Fee (HFQA), also referred to as the Quality Assessment Fee (QAF).

SYNOPSIS: PL 224-2003 § 70

Effective August 1, 2003, the Office of Medicaid Policy & Planning (OMPP) is required to collect a Quality Assessment Fee (QAF) from each nursing facility. A "nursing facility" is defined as a comprehensive care facility that is certified to participate in Medicaid. The QAF is to be collected from each facility that has a Medicaid utilization rate of at least 25 percent and has at least \$700,000 in annual Medicaid revenue. The money collected may only be used to pay the state's share of the costs for Medicaid services. The OMPP may not begin to collect the QAF until it calculates and begins paying enhanced reimbursement rates. If federal participation becomes unavailable to match the money collected from the QAF, the collection of the QAF is to cease. The OMPP is required to request and secure waivers from the United States Office of Health and Human Services, and after the approval of those waivers is to begin collecting the QAF. A nursing facility may not charge their residents the amount of the QAF the facility pays. The provision expires August 1, 2004. No rate for the QAF is stated.

PL 224-2003 § 70 is effective upon passage

SYNOPSIS: PL 78-2004 § 27

This amendment is enacted retroactive to July 1, 2003. It redefines "health facility" to mean a facility licensed as a comprehensive care facility. The definition of a "nursing facility" is amended, removing the requirement that it be a comprehensive care facility, requiring only that it be certified to participate in Medicaid. Provisions are inserted after the sub-section concerning 25 percent Medicaid participation and \$700,000 Medicaid annual revenue stating that if the United States Centers for Medicare and Medicaid (USCMM) does not approve payments under the measure, the OMPP is to revise the waiver and resubmit it to the federal government. In amending the state's waiver plan, the OMPP is to collect the QAF—retroactively effective August 1, 2003—from each health facility except:

- a continuing care retirement community
- a health facility that only receives revenues from Medicare
- a health facility with less than \$750,000 in annual income
- The Indiana Veterans' Home

If USCMM does not approve payments under Indiana's methodology, the OMPP is to revise the waiver plan as soon as possible to be able to collect the QAF retroactively effective August 1, 2003. The OMPP may withdraw its waiver plan only if it determines that failure to withdraw will result in the spending of state money not funded by the QAF. This provision is amended to expire August 1, 2005 (changing it from August 1, 2004).

PL 78-2004 § 27 is retroactively effective July 1, 2003

SYNOPSIS: PL 186-2005

This amendment changes which Indiana agency collects the QAF, splitting it between the OMPP and the Department of Revenue (DOR). Effective retroactive to August 1, 2003, the OMPP is to collect the QAF from nursing facilities and the DOR is to collect the QAF from each health facility that is not a nursing facility. The exemptions enacted in PL 78-2004 § 27 remain intact. Effectively, the OMPP collects the QAF from Medicaid participation facilities, and the DOR collects the QAF from non-Medicaid participation facilities. The language is amended to read that the OMPP and the DOR will begin collecting the QAF once the federal government approves the waiver plan. Language is added to allow facilities to enter into installment agreements with the OMPP and the DOR to pay the QAF. Changes in language are made to reference the joint implementation of the QAF between the OMPP and the DOR. Joint rules are to be adopted. Other changes in language are inserted to reference nursing facilities and health facilities. The substantive provisions are not affected. New provisions are added to charge interest on the QAF if not paid within 10 days after the payment is due. New language is added to require the OMPP and the DOR to report to the Indiana State Department of Health (ISDH) those facilities with a 120 day delinquency in paying the QAF. Upon notification, the ISDH is to notify a delinquent facility that its license will be revoked if the QAF is not paid. If the facility fails to pay the QAF, the ISDH is to revoke the facility's license. New language is added that the OMPP is to report the following information to the Medicaid oversight commission at each meeting:

BEFORE APPROVAL OF THE QAF BY THE FEDERAL GOVERNMENT

- an update on the progress in receiving federal approval for the QAF and a summary of discussions with the federal government

AFTER APPROVAL OF THE QAF BY THE FEDERAL GOVERNMENT

- an update on the collection of the QAF
- a summary of the QAF owed by facilities
- other relevant information related to the implementation of the QAF

This provision is amended to expire August 1, 2006 (changing it from August 1, 2005). An emergency is declared for this act.

PL 186-2005 is effective upon the signature of the governor

SYNOPSIS: PL 18-2006

The only amendment is to change the expiration of the act from August 1, 2006, to August 1, 2007.

Taxpayer asserts that the Healthcare Facility Quality Assessment was erroneously assessed against it and may not be collected because it is unconstitutional under the Indiana Constitution and the United States Constitution.

Taxpayer's constitutional protests are:

1. HFQA is unconstitutional special legislation under Article 4, Sections 22 and 23 of the Indiana Constitution.
2. HFQA violates the Privileges and Immunities Clause, Article 1, Section 23, of the Indiana Constitution.
3. HFQA violates the "Taking Effect" Clause of Article 1, Section 25 of the Indiana Constitution.
4. HFQA violates the "Legislative Authority" Clause of Article 4, Section 1 of the Indiana Constitution.
5. PL 186-2005 is unconstitutionally retroactive and impairs Taxpayer's contractual rights under Article 1, Section 24 of the Indiana Constitution .
6. PL 186-2005's prohibition on passing on costs to residents is an unconstitutional taking in violation of the Takings Clause of the United States Constitution and Article 1, Section 21 of the Indiana Constitution. The prohibition violates the Contracts Clause of the Indiana Constitution.

The Department takes note of Taxpayer's constitutional protests. However, Taxpayer raises issues which are beyond the purview of an administrative review. Taxpayer's constitutional challenges will not be addressed here, because the Department will not overturn a tax scheme enacted by the Indiana General Assembly based upon Taxpayer's facial constitutional challenges.

FINDING

Taxpayer's protest is respectfully denied.

II. Health Facility Quality Assessment Fee—Inapplicability to Taxpayer

DISCUSSION

Taxpayer asserts it is not subject to HFQA because it qualifies under PL 186-2005(f)(3)(a) for the exemption from collection as a "continuing care retirement community." Taxpayer acknowledges that it has a "length gap in registration that it is in the process of correction." Taxpayer asserts that PL 186-2005 does not limit the exemption to "registered" continuing care retirement communities, and as such, it is entitled to be deemed exempt. Taxpayer states that it meets the criteria established in CPA Standard SOP 90-8, *CPA Journal*, May 1991. As well, Taxpayer asserts that its contracts with the residents meet the criteria of IC § 23-2-4-1. Both are notable, but the fact remains that Taxpayer is not registered as a "continuing care retirement community." The application of IC § 23-2-4-1 is contingent on registration. *See* IC § 23-2-4-3. Taxpayer may meet the requirements of being a "continuing care retirement community," but it is not granted the status as such until it registers.

FINDING

Taxpayer's protest is respectfully denied.